# United States Department of Labor
# Employees' Compensation Appeals Board

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| **S.O., Appellant** | ) | |
| **and** | ) | **Docket No. 21-0975** |
| | ) | **Issued: March 10, 2022** |
| **DEPARTMENT OF HOMELAND SECURITY, U.S. COAST GUARD, Washington, DC, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On June 11, 2021 appellant filed a timely appeal from a June 4, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant has met her burden of proof to establish stress-related conditions in the performance of duty, as alleged.

[1] 5 U.S.C. § 8101 *et seq*.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[2] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 11, 2019 appellant, then a 50-year-old paralegal specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained a series of conditions due to work-related stress, including bipolar disorder, hypertension, incontinence/flatulence, elevated cholesterol, and diabetes. She indicated that she started working as a paralegal specialist for the employing establishment on October 20, 2014. Appellant maintained that her supervisor, L.M., created a stressful and hostile work environment over time, and indicated that there were "Equal Employment Opportunity Commission (EEOC) issues." She asserted that L.M. did not like the way she communicated and asked her if she would quit her job. Appellant noted that she first became aware of her claimed conditions on October 20, 2014 and first realized their relation to her federal employment on July 31, 2018. She stopped work on July 17, 2017.

In a June 10, 2019 statement, appellant further discussed her claimed employment-related conditions and again claimed that her work environment aggravated her health. She maintained that L.M. intentionally exposed her to a hostile work environment and asked if she was going to quit "due to circumstances surrounding my employment."

Appellant submitted medical evidence in support of her claim, including reports of Dr. Huong T. Dang, a Board-certified psychiatrist, and Dr. Oladapo Olarinde, a Board-certified family practitioner. She also submitted time and attendance summary reports from July and September 2018.

In a June 25, 2019 development letter, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. In response, appellant asserted that L.M. treated her differently on purpose due to her race and that the harassment was continuous. She claimed that L.M. retaliated against her for filing an EEOC complaint in 2016.

Appellant submitted documents relating to the EEOC complaint she filed in 2016. In the complaint, she claimed that in October 2015 she was improperly instructed not to take sick leave for the rest of the year and that in December 2015 she was denied compensatory time. Appellant also alleged that on December 24, 2015 L.M. accused her of "gaming the system" when she tried to change her schedule and that on February 15, 2016 she wrongly did not receive holiday pay. She further claimed that on March 1, 2016 she was approved for reasonable accommodation that did not address her needs and that on March 30, 2016 L.M. called her "stupid." Appellant alleged that on September 8, 2016 she was given an improper verbal reprimand when L.M. asked her if she was going to quit her job and that on an unspecified date her work duties were wrongly reduced and her work was delegated to another employee.

[2] Docket No. 20-1271 (issued March 9, 2021).

Appellant submitted an April 16, 2019 final EEOC decision, which addressed her appeal of a September 28, 2017 final decision denying her claims of discrimination. In this decision, an EEOC official addressed each of her above-noted claims and found that it had been properly determined in the prior decision dated September 28, 2017 that the employing establishment did not subject her to discrimination or other wrongdoing. The official found that the employing establishment provided reasonable accommodation to appellant for her bipolar disorder by allowing her to change her schedule and that it appropriately handled matters relating to sick leave, holiday pay, and compensatory time. The official indicated that the evidence revealed that L.M. denied that she called appellant stupid on March 30, 2016 after appellant improperly sent out a draft in portable document format (PDF), but that she indicated she might have commented that it would be stupid to put a draft into PDF. The official noted that it was confirmed that L.M. told appellant that she was "gaming the system" on December 24, 2015, when appellant attempted to change her schedule in the middle of a pay period to get more holiday time. She noted it was established that on September 8, 2016 L.M, told appellant that she should be careful about what she said to people. In addition, it was established that L.M. asked appellant whether she intended to quit and that, when appellant stated that she did not, L.M. responded by saying, "Good." The official concluded that, when considering L.M.'s comments and actions in context, it had not been shown that L.M. subjected appellant to discrimination or created a retaliatory or hostile work environment.[3]

By decision July 31, 2019, OWCP denied appellant's claim for an employment-related emotional condition. It determined that she had not established a compensable employment factor.

On August 5, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 16, 2020, she testified that L.M. threw a stapler at her on October 20, 2014. Appellant indicated that L.M. asked her whether she was going to quit and asserted that her working conditions caused or worsened her medical conditions.

After the hearing, additional documents were added to the case record, including the employing establishment's January 24, 2020 proposed removal due to appellant's excessive absences, a February 14, 2018 notice of response deadline, August 4, 2016 and January 9, 2017 affidavits that L.M. produced in conjunction with appellant's EEOC complaints, and August 10, 2016 and January 13, 2017 statements appellant produced in response to L.M.'s EEOC affidavits. In her August 4, 2016 affidavit, L.M. indicated that she provided reasonable accommodation to appellant by approving appellant's request regarding telework days. She noted that the human resources office advised her that she could not approve appellant's request to change appellant's schedule on short notice in order to receive pay for federal holidays. L.M. indicated that in December 2015 appellant sent out a draft document as a PDF document despite the fact that such documents are normally sent out in Microsoft Word format. She noted that she had a conversation with appellant, who indicated that she had intentionally sent the document as a PDF document because she thought it was a good idea. L.M. reported that she did not call appellant stupid but might have stated that it would be stupid to send the draft in the wrong format. With regard to appellant's allegation that she was accused of "gaming the system" with respect to her request to

[3] Appellant also submitted additional medical evidence in support of her claim.

change her work schedule, L.M. explained that she told appellant that it would be improper and gaming the system, to change her schedule in the middle of a pay period in order to receive pay for a holiday. She claimed that she treated appellant fairly with respect to leave matters.

In an August 10, 2016 affidavit produced in response to L.M.'s August 4, 2016 affidavit, appellant contested L.M.'s assertions with respect to schedule changes. She claimed that L.M. did, in fact, call her stupid with respect to the matter involving the PDF document, and expressed her belief that L.M. was accusing her of theft when she stated that she was gaming the system. Appellant also generally contested L.M.'s assertions that she had properly handled matters relating to leave usage and work assignments.

In her January 9, 2017 affidavit, L.M. indicated that she recalled meetings with appellant on September 8 and 15, 2016 and denied that she acted improperly. She noted that during the September 15, 2016 meeting she advised appellant that she needed to be careful about what she stated to people and consider their points of view. L.M. indicated that this comment was made in the context of the other paralegal having felt that appellant made various accusations against her. She also noted that, during this meeting, she asked appellant if she was considering quitting because of the communication issues and overlapping schedule problems among the clerks. When appellant indicated that she was not quitting, L.M. noted that she replied, "Good." She noted that she later apologized to appellant and told appellant that she was trying to speak openly and plainly. L.M. indicated that she did not recall telling appellant that a certain work assignment was none of her business.

In a January 13, 2017 statement, appellant asserted that L.M. did, in fact, tell appellant that a work assignment involving redaction of information was none of her business. She restated her belief that L.M. unfairly reprimanded her during the September 15, 2016 meeting and that she made improper comments about her communication skills.

The case record was also supplemented to include the original September 28, 2017 final EEOC decision on appellant's complaint. In this decision, an EEOC official determined that the full evidentiary record did not establish that L.M. subjected appellant to discrimination or created a retaliatory or hostile work environment. She found that the employing establishment provided reasonable accommodation to appellant for appellant's bipolar disorder and appropriately handled matters relating to sick leave, holiday pay, and compensatory time. The official noted that L.M. explained that she reassigned some of appellant's tasks to another employee because the work schedule of that employee made it more suitable for her to perform those tasks. She indicated that the evidence revealed that L.M. denied that she called appellant stupid on March 30, 2016 after appellant improperly sent out a draft in PDF, but that L.M. had indicated that she might have stated that it would be stupid to put a draft into PDF. The official noted that it was confirmed that L.M. told appellant that she was gaming the system, and that she should be careful about what she stated to people. In addition, the EEOC decision established that L.M. asked appellant whether she intended to quit and that, when appellant stated that she did not, L.M. responded by saying, "Good." The official concluded that, when considering L.M.'s comments and actions in context, no improper actions were committed.

By decision dated April 1, 2020, OWCP's hearing representative affirmed the July 31, 2019 decision. Appellant appealed to the Board and, by decision dated March 9, 2021,[4] the Board affirmed the April 1, 2020 decision.

On March 9, 2021 appellant requested reconsideration of the denial of her emotional condition claim. In support of her reconsideration request, she submitted two e-mails from the Office of Personnel Management (OPM), a February 16, 2021 e-mail advising her that a disability earnings survey had opened and a February 28, 2021 e-mail informing her that it had received her response to an OPM disability eligibility survey. Appellant also submitted a March 11, 2020 notification of personnel action (Standard Form (SF) 50) memorializing her retirement from the employing establishment on disability retirement. In an accompanying statement, she argued that the fact that she retired on disability proved that managers committed wrongdoing and that she was subjected to a hostile work environment.

By decision dated June 4, 2021, OWCP denied modification.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[7]

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.[8]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional

[4] *Supra* note 2.

[5] *Supra* note 1.

[6] *A.J.*, Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

[7] 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

[8] *See S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.[9] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[10]

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.[11] This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely affected a condition for which compensation is claimed, and a rationalized medical opinion relating the claimed condition to compensable employment factors.[12]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship, and which working conditions are not deemed factors of employment and may not be considered.[13] If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, it must base its decision on an analysis of the medical evidence.[14]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty, as alleged.

The Board preliminarily notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's April 1, 2020 decision, which was considered by the Board in its March 9, 2021 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.[15]

Appellant alleged that she sustained an emotional condition due to various incidents and conditions at her place of work. Therefore, the Board must initially review whether these alleged

[9] *Lillian Cutler*, 28 ECAB 125 (1976).

[10] *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[11] *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[12] *P.B.*, Docket No. 17-1912 (issued December 28, 2018); *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[13] *See O.G.*, Docket No. 18-0359 (issued August 7, 2019); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[14] *Id*.

[15] *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

incidents and conditions are covered employment factors under the terms of FECA. The Board notes that appellant's claim does not directly relate to her regular or specially assigned duties under *Lillian Cutler*.[16] Rather, appellant claimed that her supervisor, L.M., committed error and abuse with respect to various administrative/personnel matters. She also claimed that L.M. subjected her to harassment and discrimination.

With respect to administrative or personnel matters, appellant claimed that L.M. mishandled matters related to sick leave, holiday pay, compensatory pay, reasonable accommodation requests, and the assignment of work tasks. The Board has held that administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.[17] However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[18] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[19]

The Board finds that appellant has not submitted sufficient evidence to establish the above-noted claims about administrative/personnel matters. Appellant submitted two e-mails from OPM, a February 16, 2021 e-mail advising her that a disability earnings survey had opened, and a February 28, 2021 e-mail informing her that it had received her response to an OPM disability eligibility survey. She also submitted a March 11, 2020 SF 50 memorializing her disability retirement from the employing establishment on disability retirement. Appellant argued that the fact that she retired on disability retirement proved that managers committed wrongdoing. However, this evidence would not in any way show that management committed error or abuse with respect to administrative or personnel matters. Appellant has not otherwise presented evidence, such as a final decision of an administrative body, to show that L.M. or other managers committed error or abuse with respect to administrative or personnel matters.[20] In addition, the mere fact that appellant retired on disability retirement would not support her claims regarding administrative/personnel matters. Although appellant expressed dissatisfaction with the actions of L.M., the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.[21] Therefore, she has not established a compensable employment factor with respect to administrative or personnel matters.

Appellant also alleged harassment and discrimination by L.M. and claimed that she created a stressful hostile work environment. She asserted that L.M. treated her differently on purpose

[16] *See supra* note 9.

[17] *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[18] *M.S.*, Docket No. 19-1589 (issued October 7, 2020); *William H. Fortner*, 49 ECAB 324 (1998).

[19] *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[20] *See generally M.R.*, Docket No. 18-0304 (issued November 13, 2018).

[21] *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

due to her race and retaliated against her for filing an EEOC complaint in 2016. Appellant also claimed that L.M. made comments and engaged in actions that rose to the level of harassment and discrimination. To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from an employee's performance of his or her regular duties, these could constitute employment factors.[22] The Board has held that unfounded perceptions of harassment do not constitute an employment factor.[23] Mere perceptions are not compensable under FECA and harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred.[24]

As noted above, appellant submitted February 16 and 28, 2021 e-mails from OPM and a March 11, 2020 SF 50. She argued that the fact that she retired on disability retirement proved that she was subjected to a hostile work environment. However, these documents do not support appellant's claims of harassment and discrimination and the mere fact that she retired on disability retirement also would not support her claims of harassment/ discrimination. Appellant has not submitted sufficient documentary evidence to show that L.M. subjected her to harassment or discrimination.[25] Therefore, she has not established a compensable employment factor with respect to the claimed harassment and discrimination. As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.[26]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty, as alleged.

[22] *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[23] *See F.K.*, Docket No. 17-0179 (issued July 11, 2017).

[24] *See id*.

[25] *See B.S.*, Docket No. 19-0378 (issued July 10, 2018).

[26] *See B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 4, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board